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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 278

SINGLETON PACKING CORPORATION,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States;

The Petitioner prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit, to the end that this Court may review a decision which that Court has rendered in a case involving the above-named parties. And the Petitioner respectfully shows to this Court:

THE OPINION AND THE JUDGMENT IN THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has been printed in the official reports, and is cited as: 418 Fed.2nd 275 (5th Cir., 1969). It may be found in the following unofficial report: 61 Labor Cases ¶ 10,394 (1969). Both the Opinion and the Judgment of the Court of Appeals are printed in the Appendix to this Petition.

This case came to the Court of Appeals upon an Application For Enforcement Of An Order of the National Labor Relations Board.

JURISDICTION OF THIS COURT

The Opinion of the Court of Appeals was rendered on October 13, 1969. The Judgment of that Court is dated November 5, 1969, and was entered by that Court on that date. An Order denying Petition for Rehearing and Petition for Rehearing En Banc, was rendered on April 30, 1970. This Petition is timely filed before the date of June 18, 1970 set by the Court of Appeals as the date before which a Petition should be filed. Jurisdiction to review the Judgment of the Court of Appeals is conferred on this Court by the provisions of 28 U.S.C. §1254.

QUESTIONS PRESENTED FOR REVIEW

(I). THE SECOND ELECTION CONDUCTED BY THE N.L.R.B. WAS UNREPRESENTATIVE

(II). THE BOARD'S INVESTIGATION OF THE COMPANY'S OBJECTIONS RELATING TO THE ACTUAL CONDUCT OF THE SECOND ELECTION WAS INSUFFICIENT TO ENABLE IT TO FAIRLY RULE ON SAID OBJECTIONS

(III). THE BOARD IMPROPERLY REFUSED TO HOLD HEARINGS ON THE COMPANY'S OBJECTIONS TO THE ELECTION AT ANY TIME DURING THE PROCEEDINGS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Portions of the Constitution of the United States and of the National Labor Relations Act pertinent to this case are as follows:

(1) "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . ."

First Amendment to the Constitution of the United States

(2) "No person shall be . . . deprived of life, liberty, or property, without due process of law. . ."

Fifth Amendment to the Constitution of the United States

(3) "Employees shall have the right . . . to join or assist labor organizations. . . and to engage in other concerted activities. . . and shall also have the right to refrain from any or all of such activities. . ."

National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 157

(4) "Whenever a Petition has been filed in accordance with such regulations as may be prescribed by the Board. . . by a group of Employees. . . alleging that a substantial number of Employees. . . wish to be represented for collective bargaining. . . the Board shall investigate such Petition. . . it shall direct an election by secret ballot and shall certify the results thereof.

National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 159(c)(1).

(5) Upon the filing with the Board by 30 percentum or more of the employees in a bargaining unit covered by an Agreement. . . of a Petition alleging that they desire that such authority be rescinded, the Board shall take a secret ballot of the Empolyees in such unit and certify the results thereof . . ."

National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 159(e(1).

STATEMENT OF THE CASE

On April 4, 1966, the Union[1] filed a petition (TR.1)[2] for an election in an appropriate unit of Petitioner's employees at its seafood processing plant in Tampa, Florida. Thereafter, pursuant to a rule promulgated by the National Labor Relations Board in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), the Regional Director, 12th Region, directed employer to furnish to the Regional Director, for distribution to the Union, a list of names and addresses of all its employees in the stipulated appropriate unit. It should be noted that this took place approximately 3 months after the issuance of the *Excelsior* decision, and before any court had ruled relative to the validity of the Board's "names and addresses" rule and before the Board itself had clarified numerous questions regarding interpretation of the rule; nor had any court ruled on the issue of whether said rule was validly promulgated pursuant to the requirements of the Administrative Procedure Act.[3] Petitioner advised the Regional Director through its attorneys that

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[1] Local 104, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

[2] Citation to Transcript of Record.

[3] Administrative Procedure Act, as amended, 60 Stat. 238, 5 U.S.C.A. 56 *et seq.*, Sec. 552, 553.

it had no basic objection to furnishing the Board with such list; however, it requested some assurance from the NLRB relative to the use of the list. The Regional Director refused to make any sort of an arrangement in this regard (TR. 7 and TR. 54-57). The Regional Director did not choose to subpoena the list and on May 9, 1966, pursuant to a Stipulation For Certification Upon Consent Election, a secret ballot election among Petitioner's employees in the stipulated unit was conducted.[4] The Union lost the election (180 employees voted for the Union, 237 voted against it; there were 30 challenged ballots). The Union then filed objections alleging that the election should be set aside (TR. 6-7). Investigation was held relative to the merits of the objections to the election. At this point in the proceedings and on numerous occasions thereafter, Petitioner requested either that the Regional Director seek to subpoena the list and thereby subject the *Excelsior* issue to judicial review or that a hearing be held relative to the *Excelsior* issue so that a full record could be developed relative to the employer's position on this highly controversial subject and other facts at issue. Petitioner submitted a petition signed by its employees (TR. 19-28) and several letters from businessmen in the Tampa area (TR. 10-18) reflecting the type of evidence that it sought to present at the hearing. From this point forward, the Regional Director, and later, other official levels of the National Labor Relations Board, refused on several occasions to conduct a hearing. Thus, from the outset, employer was prejudiced by being unable to present a full and complete explanation of its position, both as to the *Excelsior* doctrine and other objections which it asserted throughout the proceedings.

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[4] The unit consisted of all production and maintenance employees employed by the Employer at the Tampa, Florida plant, located at 50th Street and ACL Railroad; excluding all office clerical employees, guards, watchmen, professional employees, and supervisors as defined in the Act.

Following investigation relative to the merits of the Union's objections to the election, the Regional Director recommended that the election be set aside on two grounds: that (1) the Company refused to furnish the Regional Director a list of names and addresses of all eligible voters as required in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); and (2) that company pre-election misconduct interfered with employees' free choice in the election (TR. 53-77). On August 24, the NLRB set the first election aside *solely* on the one ground of Petitioner's refusal to furnish the Regional Director a list of names and addresses. The Board withheld ruling on the allegation of pre-election misconduct (TR. 90-93). A second election was scheduled (TR. 1). The Company believed the *Excelsior* Rule to be invalid since at this point no Court had yet ruled on the merits of the Rule nor the manner in which it was promulgated. At this juncture,[5] the Company was faced with the prospect of either participating in an election which it knew the Board would set aside (assuming that it again won the election) or refusing to participate in the hope that the Board would then subject the *Excelsior* issue to litigation by subpoenaing the list. Petitioner chose not to participate in any way in the election (TR. 114-115). Throughout this proceeding, the Board continually has referred to Petitioner's "refusing to cooperate with the Board". This subject of cooperation was a "one way street" as far as the Board was concerned in this particular instance. The Company was never able to obtain the Board's cooperation in obtaining or awaiting a judicial determination of the *Excelsior* issue prior to holding a second election[6] or in investigating the second election.

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[5] August 24, 1966.

[6] See TR. 161 para. 24 in this regard.

On October 13, 1966, the Board conducted a second election. One hundred and fifty-one (151) persons voted. One hundred and thirty-six (136) voted for the Union. One (1) voted against the Union. There were fourteen (14) challenged ballots and one (1) ballot was void. (TR. 109). The voters constituted approximately one-quarter (¼) of the employees in the unit on the day of the election. Just prior to the election, approximately four hundred (400) employees had advised the Company in writing that they did not want their names or addresses given to the Union (TR. 100-101).

The Company filed timely objections to the election, alleging that the election should be set aside for the following reasons (TR. 109-110):

(1) The first election was improperly set aside since the Company was not required to comply with the allegedly invalid *Excelsior* rule.

(2) An insufficient number of employees voted in the second election to consider the vote a representative sample of all the employees in the unit.

(3) The Union engaged in pre-election coercion and threats of physical violence and job loss for the employees.

(4) Certain ineligible employees voted in the election.

(5) The election was held in an unsuitable place, where a Union rally had been held the night before the election.

(6) The Board should not have held a second election but, instead, should have sought an injunction in a Federal District Court to compel the Company's production of the *Excelsior* list.

(7) The totality of conduct and events set forth above, effectively interfered with the fair and proper conduct of the election.

Thereafter, the Regional Director conducted an investigation of the issues raised by the objections. The parties were given an opportunity to submit written evidence in support of these issues, but *no hearing was conducted although numerous requests were made by the employer for a hearing.* Petitioner was unable to question Union adherents relative to their involvement in acts of misconduct and coercion, for fear that such interrogation would give rise to unfair labor practice charges, and because of the unavailability of many non-employee adherents and business agents.

Following the election the Regional Director conducted a cursory investigation into Petitioner's objections. Petitioner submitted factual allegations to support its objections (TR. 100-108). The Region's attitude throughout this investigation evidenced an obvious desire to want to approve the second election and certify the Union if at all possible. Frankly speaking, the Region appeared irritated by Petitioner's non-compliance with the Board's *Excelsior* Rule. Petitioner asserts that the tone of the record supports this.[7] Any questioning of employees (if questioning actually took place) relative to Petitioner's allegation of pre-election threats and coercion, unsuitability of the election site and other improprieties, was done in privacy without the attendance or notification of Petitioner's attorneys. Petitioner was never advised of the result of such investigation or that any investigation was conducted, other than a conclusive statement relative to the fact that the evidence it submitted was "apparently isolated" (TR. 122). Petitioner continually requested a hearing, to no avail. In short, it can be said that an investigation was held in form but not in fact.

[7] See the 5th Circuit's observation at page 281 (Appendix page 16) of the Opinion below.

On November 25, 1966, the Regional Director issued his Report On Objections To Second Election and Recommendations To The Board (TR. 108) ruling against Petitioner on all objections. On December 22, 1966 the Company filed with the Board its exceptions to the Regional Director's report (TR. 128-133). The National Labor Relations Board on February 24, 1967 issued its Supplemental Decision and Certification of Representative (TR. 133-134) in which it adopted the Regional Director's report and certified the Union as the bargaining representative of the Company's employees.

The Union, by telegram dated February 28, 1967, requested the Company to bargain (TR. 139). By letter to the Union dated March 2, 1967, Petitioner replied to the Union's request for bargaining by stating that it disagreed with the decision and certification of the Board; that it continually had had a good faith doubt that the charging party ever represented a majority of the Company's employees; that its position on the various issues involved had been stated in pleadings submitted to the National Labor Relations Board; and that if necessary it intended to obtain judicial review of the matter (TR. 139). The Union thereafter filed an unfair labor practice charge against Petitioner alleging that Petitioner had refused to bargain with it in violation of Section 8(a) (1) and (5) of the Act. A Complaint based on this charge was issued by the Regional Director on March 31, 1967 (TR. 135-140). On April 10, 1967, the Company filed its Answer, in which it admitted its refusal to bargain with the Union, but contended that the Union was improperly certified by the Board (TR. 143, 151). The General Counsel then moved to strike parts of the Company's Answer and for Summary Judgment on the ground that the only issues raised by the Company's Answer had been decided in the underlying Representation Case, and could not be relitigated in the Unfair Labor Practice proceed-

ing (TR. 149-150). This motion was referred to a Trial Examiner. The Company then filed an Opposition to the General Counsel's Motion (TR. 151) together with an affidavit (TR. 154) of John E. Duggan, the Company's Vice-President, in support of its Opposition, in which it asserted as justification for the Company's refusal to bargain, that the Second Election and Certification of the Union was invalid. Petitioner reiterated its request for a hearing (TR. 151-154), and therein, and in Mr. Duggan's Affidavit, set forth numerous allegations relative to facts supporting its objections about which it sought to adduce testimony at such a hearing (TR. 151-162).

On June 27, 1967, the Trial Examiner issued his decision granting the General Counsel's Motion For Summary Judgment (TR. 176-186).

The National Labor Relations Board affirmed the Trial Examiner's Decision granting the Motion for Summary Judgment; found that the Company had violated Section 8(a) (1) and (5) of the Act; and ordered the Petitioner to cease and desist from unlawful conduct [there was no finding of any violations independent of the refusal to bargain]; to post appropriate notices; and to bargain with the Union upon demand (TR. 190-191).

Petitioner advised the National Labor Relations Board that its position was that the Board's Order was based on invalid premises and procedures; whereupon the Board filed its Application for Enforcement of an Order with the United States Court of Appeals for the Fifth Circuit.

The Court of Appeals entered a Judgment enforcing the Order of the Board.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND OF THE UNITED STATES SUPREME COURT AS TO THE PROPER INTERPRETATION OF THE N.L.R.A., 29 U.S.C., SEC. 159(c)(1) RELATIVE TO MINORITY ELECTIONS.

Section 159(c) provides that the National Labor Relations Board shall have the authority to determine the representational status of a petitioning labor organization. This has been interpreted to allow the Board to validate certain minority elections. Previous United States appellate cases: *Virginian Railway Co. v. System Federation No. 40,* 1937, 300 U.S. 515, 560, 57 S.Ct. 592, 605, 81 L. Ed., 789-07; *N.L.R.B. v. Whittier Mills Co.,* 111 F.2d 474 (C.A. 5, 1940); *New York Handkerchief Manufacturing Co. v. N.L.R.B.,* 114 F.2d 144 (C.A. 7, 1940); *N.L.R.B. v. National Mineral Co.,* 134 F.2d 424 (CA 7, 1943) cert. denied 302 U.S. 753; *N.L.R.B. v. Central Dispensary & Emergency Hospital,* 145 F.2d 852 (CADC, 1944), cert. denied 324 U.S. 847 (1945); reviewing these NLRB cases have established that for a valid representational election to exist, it is clear that one of two factors must exist in a case, namely that at least 40% (a large minority) of the eligible voters voted in a given election, and/or there were substantial concurrent *unfair labor practices* which influenced the Court. A careful review of the record in the instant case, reveals that it can be distinguished from all of these previous cases, since *neither* of these two factors is present in respect to the election involved. First of all, the *total* participation herein was only about 27%. It seems clear

and only reasonable that at some point in a proceeding the number voting becomes too small to be deemed to have any sort of controlling effect upon a given electorate.

Secondly, and most important, there is absolutely no allegation or finding that any unlawful conduct on the part of the employer herein, contributed to the small turn out in the election. No unfair labor practice charges making such allegations were ever filed. Although the Regional Director, in his Report On Objections To Second Election, found that the Employer was responsible for the small voter turn out, neither the Regional Director, the Trial Examiner, the Board, nor the Court of Appeals made any finding that the Employer had violated the Act by openly stating its position concerning the *Excelsior* Rule or by requesting its Employees not to participate in the Second Election solely for that legal reason (TR. 118-119). This would seem to be a First Amendment right of Employer. In its decision below, the Court seemed to equate any criticism or opposition to the election by the Company as amounting to an "undermining" of the representation proceeding. Petitioner submits that by merely stating its legal position to its Employees and requesting them for that reason alone not to participate in the election, the Company did not engage in the sort of activity confronting Appellate Courts in other cases (all situations involving flagrant unfair labor practices), where less than 40% of the electorate voted and elections were found valid. Petitioner submits that the Court and the Board should have viewed the situation from the Company's position in that it was faced with a situation where the Union had lost the First Election; the First Election had been set aside *solely* on the basis of the non-submittal of the employee list pursuant to the as yet non-judicially validated *Excelsior* Rule; the Board demanded a Second

Election on the *sole* basis of its *Excelsior* based ruling; and the Company was faced with the prospect that win or draw, the Second Election would also be set aside for non-submission of the *Excelsior* list. Petitioner submits that its action in the context of these facts was not sufficient to warrant the certification of the Union by application of the minority election rule; and that the rule was not applied consistent with precedent.

IV

An additional consideration, cited in Petitioner's brief to the Board and the Court, concerns the fact that it was clear from simple mathematical computation that at least 355 eligible employees did not vote in the Second Election. This is almost the number (400) of Employees who had given individual written instructions to the Employer at about that time requesting that their names not be turned over to the N.L.R.B. to be made available to the Union or any other party (TR. 100). Since the vast majority of the Unit employees were of this common view, it is logical to assume that they were sympathetic to the Company's position that the *Excelsior* list should not be released to the Union. Moreover, their sympathy with the Company's position undoubtedly was one of the principal factors which prompted them to stay away from the Second Election. Attesting to this is the fact that no charge, allegation or finding of Company intimidation prior to the Second Election was ever made.

Now, although the Company was incorrect in its position concerning the validity of the *Excelsior* Rule, this does not change the fact that a vast majority of the Employees believed in the Company's position, and undoubtedly thought that the Second Election was invalid. Should they, who are blameless, now have a Union thrust upon them which was voted in by only 27% of the unit employees? It would seem to be just as wrong to force

a Union upon a majority which does not want Union representation, as to deny Union representation to a majority which desires such representation.

A logical and practical solution is to call for another election. To hinge a decision herein on the estoppel principal would fail to take cognizance of the fact that it is the *unit of Employees,* rather than the Employer or Union, which should have the ultimate decision of whether they want Union representation. No amount of fault finding with respect to the circumstances surrounding the Second Election can create a logical basis for a positive answer to the all important question: "Was the election truly representative?" Under the circumstances of this case, and particularly in view of the results of the First Election, the fact that more than 70% of the eligible employees did not vote in the Second Election cannot be attributed to indifference, neglect, or fault on their part. If the Union is now thrust upon them without the opportunity for another election, the underlying premise for such a course would only be to penalize the employees and employer alike because the latter choose to test the validity of the *Excelsior* Rule. Seemingly, no benefits would accrue to the Union if it is certified, and in reality it only represents a small minority of the Employees.

Review of the "minority election" rule is important to resolve the conflict that now exists between this decision, validating a small minority election with *no* accompanying unlawful or coercive activity, and the decisions of this Court and other Circuit Courts.

Evidence of Congressional intent and evaluation of the lack of union support by even 30 per centum of the electorate is evidenced by Section 159(e)(1) of the National Labor Relations Act. (In the instant case, there

was a possible 70 per centum lack of support.) Such an unreasonable and unrealistic precedent should not be allowed to survive by this Court.

2.

THE DECISION BELOW RAISES SIGNIFICANT, PROBLEMATICAL, AND RECURRING QUESTIONS CONCERNING THE RIGHT OF CITIZENS TO A HEARING BEFORE ADMINISTRATIVE AGENCIES.

As will be seen below, there is much diversity between circuits and even within the Fifth Circuit relative to this question of the right to a hearing. Recognizing this problem, the National Labor Relations Board, in the instant case, in a Petition dated March 17, 1969, to the Fifth Circuit requested an En Banc Hearing to resolve a conflict within the Circuit relative to when a hearing is required. Petitioner reiterated the Board's request in its Petition for Rehearing. Both requests were denied. The Court did respond to the Board's earlier request for consolidation of several cases with the common question of the right to a hearing in issue for oral argument, and ordered five cases with this common issue to be heard at the same time by the same three Judge panel. Although oral argument in the Fifth Circuit on the five cases was conducted on the same date, the Court decided the individual cases separately and in announcing them at different times, did not refer to the fact that they were heard together or put particular emphasis on comparing the issue of the right to a hearing vis-a-vis the particular cases involved.

Petitioner suggests to the Court that a careful analysis of the cases decided by various Circuits, and within the same Circuits will reveal much confusion, contradiction, and illogical hair splitting, relative to this question of a right to an administrative hearing.

See, for instance; *Howell Refining Co. v. N.L.R.B.*, 400 F.2d 213 (C.A. 5, 1968); *Sonoco Products Company v. N.L.R.B.*, 399 F.2d 835 (C.A. 9, 1968); *Heights Funeral Home, Inc. v. N.L.R.B.*, 385 F.2d 879 (C.A. 5, 1967); *Home Town Foods, Inc., d/b/a Foremost Dairies of the South v. N.L.R.B.*, 379 F.2d 241 (C.A. 5, 1967); *N.L.R.B. v. Ortronix, Inc.*, 380 F.2d 737 (C.A. 5, 1967); *S.H. Lynch & Company, Inc., v. N.L.R.B.*, 377 F.2d 558 (C.A. 5, 1967); *United States Rubber Company v. N.L.R.B.*, 373 F.2d 602 (C.A. 5, 1967).

Petitioner feels that while differences may always be found between individual cases, that when the cited cases are compared with the instant case, there is not sufficient difference between them to indicate that in those cases, hearings should have been ordered, and in the instant case, a hearing denied.

In essence, the Company's position is that its objections to the election were improperly investigated and rejected by the Board, and additionally, the Board's refusal to grant a hearing, either during the representation proceeding or during the Unfair Labor Practice proceeding relative to its objections, constituted a denial of due process of law in contravention of the Fifth Amendment.

The National Labor Relations Act entrusts the conduct of representation elections to the Board. It has been recognized that the Board must have a "wide degree of discretion" in controlling and overseeing the election process. Inherent in this grant of discretion is the concept that the Board will not abuse this grant and will see that the rights of citizens are carefully observed. Increasingly within the last decade, the Board and other administrative agencies have met with public criticism. Some of this criticism is no doubt due to the controversial substantive nature of the economic sphere that is being regulated. On the other hand, Petitioner would

submit that a substantial amount of this criticism is as much attributable to the procedural conduct of administrative agencies, as to the content of their subsequent decisions.

Referring now to the particular factual situation at issue, Petitioner submits that the Board abused its discretion in not at any time convening a hearing during the course of the Representation and Unfair Labor Practice proceedings; and, in the aftermath of a Second Election, in not conducting a proper investigation relative to the Employer's objections to that election. There is a limit to the exercise of the Board's discretion: *United States Rubber Company v. N.L.R.B.*, 373 F.2d 602 (C.A. 5, 1967); *Home Town Foods, Inc. d/b/a Foremost Dairies of the South v. N.L.R.B.*, 379 F.2d 241 (C.A. 5, 1967); *S.H. Lynch & Company, Inc. v. N.L.R.B.*, 377 F.2d 588 (C.A. 5, 1967); *N.L.R.B. v. Orthronix, Inc.*, 380 F.2d 737 (C.A. 5, 1967). The Board has admittedly developed standards and guidelines to identify the showing necessary to overturn an election. The objecting party must produce specific evidence that an election was improperly conducted or that facts attending the election warrant setting it aside. Respondent produced such evidence (TR. 100-108). Respondent's problem, in this particular instance was that it could not adduce or present more evidence to the Board (other than by indicating its source or indicating the evidence that Respondent would elicit) because the Board continually denied Respondent a hearing. The Board stated in its Brief to the Court that there is a "heavy" burden placed on the Company to show that an election is improper. The burden grows heavier every day as the Board increasingly relies on its Summary Judgment procedures to deny hearings in Representation Cases and subsequent Unfair Labor Practice Cases based on refusals to bargain. *N.L.R.B. v. Ortronix, Inc.*, 380 F.2d 737 (C.A. 5, 1967).

It is difficult to argue on the basis of the inadequate record before the Court, whether or not the Board should have set aside the Second Election on the basis of the threats, coercion, choice of election site, and other factors bearing on the outcome of the second election. Petitioner's position is that by not convening a hearing and giving all parties to the proceeding an opportunity to present and adduce evidence relative to the various objections, including the opportunity to subpoena and cross examine Union officials and Union adherents among the Employees, that the Board did not have before it sufficient evidence relative to the Company's position to have been able to fairly rule on said objections, *United States Rubber Company v. N.L.R.B.*, 373 F.2d 602 (C.A. 5, 1967). Thus, when the Fifth Circuit affirms the Board's decision generally to the effect that Petitioner presented insufficient evidence, or that the evidence presented did not affect the election, it does so after the Board effectively prevented Petitioner from fully developing the record in this respect. Petitioner submitted two employee affadavits (TR. 104-107), which certainly reflect an extremely aggressive attempt by Union adherents to influence the outcome of the election. Respondent will not attempt hair-splitting arguments in regard to the intent of these individuals (which could have been ascertained by an examination under oath), but asserts that conduct of the sort described in the Affidavit seems certain to have affected the election to some degree. If a hearing had been held, the Company would have been able to question under oath individuals like Ethelene Allred, Dominga Morejon, Delores Bernardez and others, including Union officials. In the course of the submission of evidence in support of Employer's Objections To Conduct Effecting Outcome of Second Election (TR. 97-100), Respondent requested that agents of the National Labor Relations Board interrogate these individuals (and other individuals whom they might name) relative

to the coercion and threats that did exist (TR. 98). At that time, employer had been informed by its supervisors that a number of its individual employees were subjected to similar threats of harm and job loss, but that said individuals were afraid to tell the employer about these situations or identify the Union supporters that had made such threats because of fear of reprisal (Ibid.). Employer advised the NLRB of these allegations, since this would require interrogation of its employees (TR. 100).

Petitioner presented an affidavit and photographic evidence of the Union activity to the Board at this time reflecting visible evidence of injury to employee White, which certainly was "specific evidence" of violent activity on the part of an alleged Union adherent (TR 102-104). The Regional Director never replied to Petitioner's request. The Regional Director's report pertaining to the objection relating to threats (TR. 122) contains as brief a coverage of the subject matter involved as it would have been possible to present. Evidence of the Regional Director's lack of interest in finding evidence to support Petitioner's objections is the fact that at no point in his discussion of these objections in his report (Ibid.) did he mention the fact that the employees making the threats were Union adherents; nor did he mention that employee White had been beaten and vilified by a Union adherent; nor did he mention that employee Alfonso had to have her telephone disconnected because of threats; nor did he mention that Union adherent Bernardez had told Alfonso that the Vice President of the Union wanted to come by her house (in the context of these threats and coercion); nor did he mention the threatened bombing by Union adherent Morejon; nor did he mention the fact that employee Alfonso's automobile's window was broken with rocks while sitting outside her house in the context of all of the above (TR. 102-107). The Regional Director stated in his report that "no evidence" was pre-

sented during this investigation that the employee making such threat was acting as an agent for the Petitioner. Agency can only be proven with facts. Had a hearing been held to afford Petitioner an opportunity to question the Union adherents involved, it is quite possible that facts sufficient to constitute an agency relationship could have been elicited. *Sunoco Products Company v. N.L.R.B.*, 399 F.2d 835 (C.A. 9, 1968). Certainly, the allegations in the Affidavits constitute more than "no evidence" of agency. *United States Rubber Company v. N.L.R.B.*, 373 F.2d 602 (C.A. 5, 1967). The Regional Director engages in hair-splitting when at the same point in his report (Ibid.) he states that the threats that were made were to require the witness to vote in the election and not how to vote." In Paragraph 2 of Exhibit E (TR. 106) affiant stated that Morejon "raised a peeling pan in the air and threatened to hit me with it when I again said I would not join the Union." In Paragraph 3 of the Exhibit, affiant stated that employee Allred was after her for several weeks before the election to try to get her to vote and stated that she was mad at her for being for the Company (Ibid.). Shortly after this, Allred attacked White in her home (Ibid.). These affidavits when fairly considered clearly indicate, as a minimum, that at least some effort was being made by someone to get employees to vote, and that they more than preferred that they vote for the Union. Again, without a hearing and an opportunity to question the individuals involved, and possibly to question other individuals whose names might be elicited during such protected interrogation, Petitioner was unable to produce more evidence to support its objection. *Sunoco Products Company v. N.L.R.B.*, 399 F.2d 835 (C.A. 9, 1968). The Regional Director stated in his report that the threat was an "apparent isolated" incident (TR. 122). This use of the word "apparent," in itself, indicates that the investigation conducted by the Region was one in form rather

than fact. If the Region had, *in fact,* conducted an extensive investigation as requested by Petitioner (TR. 98 and 100) and had indeed determined that the incident was isolated, it could have made such a statement and would not have had to hedge with the word "apparent."

Petitioner would contend that in fact the Region's investigation in regard to the objection involving threats was cursory in nature. The Regions merely reviewed the evidence submitted by Petitioner and did no more. Again, the Petitioner cannot prove this (nor has the Board disproved it) because Petitioner was not afforded an opportunity to independently adduce these facts in the course of a hearing.

Petitioner would contend that the concept of due process inherent in our Anglo-Saxon judicial system requires that parties to judicial and quasi-judicial proceedings be given an opportunity to appear and present their positions relative to the particular points in issue in a given situation. This is a very broad general rule. *Home Town Foods, Inc. d/b/a Foremost Dairies of the South v. N.L.R.B.,* 379 F.2d 241 (C.A. 5, 1967). Administrative agencies should not be allowed to conduct closed "investigations," which are investigations in form only and conducted without the presence or participation of the parties, which are cloaked with an aura of completeness, simply because they are conducted by the Agency, *N.L.R.B. v. Ortonix, Inc.,* 380 F.2d 737 (C.A. 5, 1967); *Howell Refining Co. v. N.L.R.B.,* 400 F.2d 213 (C.A. 5, 1968). In the instant case, Petitioner provided "specific evidence" to show that the Union or Union adherents conducted coercive activities prior to the election (TR. 97-107). It further advised the Regional Director that it understood that other employees had been intimidated, but that said employees were afraid to testify about such

intimidation. Petitioner also stated that it did not want to interrogate employees relative to these matters and requested the Board to conduct such interrogation (TR. 100). Because of these built-in limitations on Petitioner's ability to interrogate, it could not at the time in question supply more specific information to the Regional Director. This is not required, *United States Rubber Co. v. N.L.R.B.*, 373 F.2d 602 (C.A. 5, 1967).

Having denied Petitioner a hearing during the Representation proceeding, the NLRB was able to deny a hearing during the Unfair Labor Practice proceeding by invoking its rule providing that Petitioner had no right to a hearing without new or previously unavailable evidence. Citing numerous "relitigation cases", the Board contended that Petitioner had no right to a hearing on issues disposed of in a previous Representation case. This is not Petitioner's understanding of the law, *Heights Funeral Home, Inc. v. N.L.R.B.*, 385 F.2d 879 (C.A. 5, 1967).

Finally, Petitioner would argue that as a matter of public policy, Board policy should be reviewed in regard to favoring the convening of a hearing at some point in such a proceeding. The Courts have been encouraging such an expansion. *Home Town Foods, Inc. d/a/ Foremost Dairies of the South v. N.L.R.B.* 379 F.2d 241 (C.A. 5, 1967); *S. H. Lynch & Company, Inc. v. N.L.R.B.* 377 F.2d 558 (C.A. 5, 1967); *N.L.R.B. v. Ortronix, Inc.* 380 F.2d 737 (C.A. 5, 1967); *Howell Refining Co. v. N.L.R.B.*, 400 F.2d 213 (C.A. 5, 1968); *Sunco Products Company v. N.L.R.B.* 399 F.2d 835 (C. A. 9, 1968); *Heights Funeral Home, Inc. v. N.L.R.B.* 385 F.2d 879 (C.A. 5, 1967). Regardless of the Board's desire to increase its administrative efficiency and con-

serve the public dollar, when a hearing is not held, the respondent citizen feels that his position has been ignored by the faceless government about which he so often complains. When a hearing is held, it affords all sides the opportunity to present their positions in public and to examine the position of the other parties to their satisfaction. This process has an ameliorative effect, in that all parties feel that they have had a "fair trial" regardless of the final outcome of the case. This is particularly true in a case such as this one which has reached the Supreme Court with a record that is inadequate on many points.

Petitioner definitely does not argue that senseless hearings should be held where there are no facts in issue. Petitioner does assert that where there are material facts in issue, such as in the present case, that as a matter of public policy, the Board should conduct a hearing and afford the parties an opportunity to construct a record. *Where there are a few facts in issue (which might conceivably turn the resolution of the case), the Board should be just as punctilious in conducting a hearing as if there were a hundred facts in issue.* The question is not one of quantity, but of quality. If the Board wishes to appear a more objective administrative agency in the public eye, it must refrain from constructing a procedural record such as this one in the future.

Certiorari should be granted to resolve the confusion and differences between Circuits and within Circuits on this hearing issue. There are no doubt more than fifty cases per year litigated to the Appellate level on this issue alone; its resolution would reduce the load of Federal Appellate cases in all Circuits and in this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Fifth Circuit.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26784

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SINGLETON PACKING CORP.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Florida case)

(October 13, 1969)

Before WISDOM and CARSWELL, Circuit Judges, and ROBERTS, District Judge.

WISDOM, Circuit Judge: In *Excelsior Underwear, Inc.*, 156 N.L.R.B. No. 111 (1966) the National Labor Relations Board held that an employer may be required to submit to a Regional Director the names and addresses of employees eligible to vote in a representation election; the Director makes the list available to the parties involved in the election. Singleton Packing Corporation's opposition to the *Excelsior* rule and the Company's determination to subject the rule to judicial review generated this case now before the Court. Unfortunately for Singleton, by the time the litigation reached the stage of judicial review both this Court and the United States Supreme Court had approved the rule. *Howell Refining Co. v. NLRB*, 5 Cir. 1968, 400 F.2d 213, 215-16; *NLRB v. Wyman-Gordon Co.*, 1969, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709. As a result of Singleton's having made the wrong guess and having pursued a course of action based on that guess, only the remnants of the case remain.

I.

April 4, 1966, the Union[1] petitioned for an election in a stipulated unit of production and maintenance employees in Singleton's seafood processing plant in Tampa, Florida. The Regional Director of the National Labor Relations Board directed the Company to furnish a list of the names and addresses of all eligible voters in accordance with the Board's then recent decision in *Excelsior Underwear*. Singleton conditioned its compliance with the order upon assurance from the Board that the list would be "used for the union's legitimate purposes only during the current organizational campaign" and a promise of indemnification "against loss arising out of this publication of said list". The Regional Director refused to make such assurances.

May 9, 1966, the Regional Director conducted an election which the Union lost by a vote of 237 to 180 (there were 30 challenged ballots). The Union filed timely objections on two grounds: Singleton's refusal to furnish the *Excelsior list,* and pre-election misconduct by Singleton that interfered with the employees' free choice. After making an investigation, the Director sustained the Union's charges and recommended to the Board that the election be set aside. On August 24 the Board set aside the election on the first ground and declined to reach the second.

Then, the cycle recommenced. Still no court had ruled on *Excelsior's* validity at the time of the Board's order. Apparently hoping to force the Board to subpoena the list of employees and thus subject *Excelsior* to judicial review, Singleton refused to cooperate "in any way whatsoever in conducting a second election". It refused to allow the balloting to be conducted on its premises, refused to comply with the *Excelsior* order, refused to participate in a pre-election conference, refused to des-

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[1] Local 104, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

ignate election observers, and refused to permit individual notices of the election to be delivered to its employees at the plant. Indeed, the Company strenuously urged its employees to boycott the election. To no one's surprise, therefore, few employees voted in the election on October 13 and those who did voted for the Union. The Union won the election by a vote of 136 to one; there were 14 challenged ballots and one void ballot.

It was now Singleton's turn to object. Singleton contended that the election should be set aside for the following reasons:

(1) The first election was improperly set aside since the Company was not required to comply with the allegedly invalid *Excelsior* rule.

(2) An insufficient number of employees voted in the second election to consider the vote a representative sample of all the employees in the unit.

(3) The Union engaged in pre-election coercion and threats of physical violence and job loss for the employees.

(4) Certain ineligible employees voted in the election.

(5) The election was held in an unsuitable place, where a union rally had been held the night before the election.

(6) The Board should not have held a second election but, instead, should have sought an injunction in a Federal District Court to compel the Company's production of the *Excelsior* list.

(7) The totality of conduct and events set forth above effectively interfered with the fair and proper conduct of the election.

The Regional Director conducted an investigation of these issues and allowed the parties to submit written evidence, but refused to conduct a hearing. He ruled against Singleton on all objections. On February 24, 1967, the Board adopted the Regional Director's report and certified the Union as the bargaining representative of Singleton's employees.

February 28, 1967, the Union requested Singleton to bargain. When Singleton refused, the Union filed an unfair labor practice charge, alleging that the refusal violated §§ 8(a) (5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158 (a) (5) and (1) (1964). In answer to the Regional Director's complaint of March 31, 1967, Singleton admitted its refusal to bargain but contended that the Union had been improperly certified. The Trial Examiner at the unfair labor practice proceeding granted General Counsel's motion for summary judgment, and on August 31, 1967, the Board affirmed the decision, finding that Singleton had violated the Act as charged. The Board now seeks enforcement of its order against Singleton in accordance with § 10(e) of the Act, 29 U.S.C. § 160(e) (1964).

Three issues are presented. (1) Was Singleton bound to observe the *Excelsior* rule? (2) Was the second election representative? (3) Should the Board have accorded Singleton a hearing on its objections to the second election or in the unfair labor practice proceeding?

II.

Howell Refining Co., and *Wyman-Gordon* effectively repel Singleton's attack on the *Excelsior* rule. In *Howell;* we held the *Excelsior* rule to be a valid exercise of the Board's power to ensure employees a fair and free choice in the selection of their representative. 400 F.2d at 216. *See also Groendyke Transport, Inc. v. Davis,* 5 Cir. 1969, 406 F.2d 1158, 1164. In *Wyman-Gordon,* the four-Justice plurality opinion of the Supreme Court and two dissenting Justices found fault with the Board's promulgation of the *Excelsior* rule. Three other con-

curring Justices who had found it substantively and procedurally valid joined the plurality in enforcing the rule because the Board had issued a specific order to the employer to submit an *Excelsior* list. Singleton finds itself in the identical situation. The Board correctly set aside the first election for Singleton's refusal to deliver an *Excelsior* list.

Singleton contends next that the second election conducted by the Board was so ill-attended that its result must be set aside as unrepresentative of the employees. Singleton points out that the first election enjoyed a ninety per cent turnout: 447 of 503 eligible voters participated. At the second election, however, only twenty-seven per cent (101 of 506 eligible) voted.

In his Report on Objections to the Second Election (later adopted by the Board), the Regional Director found that the second election had been well publicized for the benefit of all the employees and that they had an adequate opportunity to participate in the balloting if they had wanted to do so. He attributed the small turnout to the Company's statements to its employees to boycott the second election. On September 30 and again on October 7, the Company had issued notices to its employees urging them to "stay away from the election".

We must agree with the Regional Director and the Board. In dealing with a section of the Railway Labor Act, 45 U.S.C. § 152 (1964) that provided for majority determination of representatives, the Supreme Court has said:

> It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified

> majority of those participating in the election. Those who do not participate "are presumed to assent to the expressed will of the majority of those voting."
>
> We see no reason for supposing that [this section] was intended to adopt a different rule. If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the Act, which is dependent for its operation upon the selection of representatives. There is the added danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer.

Virginian Railway Co. v. System Federation No. 40, 1937, 300 U.S. 515, 560, 57 S.Ct. 592, 605, 81 L.Ed. 789, 806-07 (citations omitted). In applying the principle of *Virginian Railway* to the National Labor Relations Act, this Court has pointed out that like the Railway Labor Act, § 9 does not expressly provide what sort of majority shall control the result of an election. We concluded, however, that "[t]he general rule, in the absence of a clear provision otherwise, is that voters who could have voted in a formal election but do not are considered to assent to the will of the majority of those who do vote". *NLRB v. Whittier Mills Co.*, 5 Cir. 1940, 111 F.2d 474, 477.[2] Although *Whittier Mills* involved an election where a majority of the employees in the unit had voted, its principles should apply to

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[2] Accord: NLRB v. Deutsch Co., 9 Cir. 1959, 265 F.2d 473, 478-81, *Cert. denied*, 1960, 361 U.S. 963; Standard Lime & Stone Co. v. NLRB, 4 Cir. 1945, 149 F.2d 435, 436-39, *cert. denied*, 1945, 326 U.S. 723; NLRB v. Central Dispensary & Emergency Hospital, D.C. Cir. 1944, 145 F.2d 852, 853-54, *cert. denied*, 1945, 324 U.S. 847; NLRB v. National Mineral Co., 7 Cir. 1943, 134 F.2d 424, 426-28, *cert. denied*, 1943, 320 U.S. 753; New York Handkerchief Manufacturing Co. v. NLRB, 7 Cir. 1940, 114 F.2d 144, 148-49, *cert. denied*, 1940, 311 U.S. 704; *see* Semi-Steel Casting Co. v. NLRB, 8 Cir. 1947, 160 F.2d 388, 391-92, *cert. denied*, 1947, 332 U.S. 758.

the case before us where the losing party actively encouraged non-participation. The Company's conduct here undermines the representation election and certification proceeding which Congress has designated as a means of selecting an exclusive bargaining agent for employees. To void the results of the election would reward such conduct.

We need spend no time on Singleton's contention that the Board's proper remedy for its *Excelsior* violation was a subpoena so that Singleton could secure judicial review. It was within the Board's administrative discretion to issue or not to issue a subpoena. *Cf. NLRB v. British Auto Parts, Inc.*, C.D. Cal. 1967, 266 F. Supp. 368, 374, *aff'd*, 9 Cir. 1968, 405 F.2d 1182, holding that the Board may use a subpoena or unfair labor practice proceeding to secure the *Excelsior* list. We have spoken before of "the congressional policy of severely circumscribing review of representation matters", and reasoned that "it must be assumed that Congress was aware of these obstacles to a challenge of election procedures, and that it intentionally made it difficult for the employer to attack election procedures in order to insure that frivolous complaints were not utilized to bring about a postponement of collective bargaining". *Boire v. Miami Herald Publishing Co.*, 5 Cir. 1965, 343 F.2d 17, 25, 22, *cert. denied*, 1965, 382 U.S. 824.

IV.

We deal finally with that "recurring question before this Court, *NLRB v. Crest Leather Manufacturing Corp.*, No. 26,645, 5 Cir. July 22, 1969 [F.2d]: Should the Board have accorded the Company a hearing? There is no statutory requirement of a post-election evidentiary hearing in a representation proceeding. The Board's Rules and Regulations provide a hearing when there are "substantial and material factual issues" which can be resolved only after a hearing. 29 C.F.R. 102.69(c), (e) (1969). This Court has held that this administrative standard "is also the consti-

tutional standard under the due process clause". *NLRB v. Smith Industries, Inc.*, 5 Cir. 1968, 403 F.2d 889, 892. The burden is on the objecting party, however, to present "specific evidence which prima facie would warrant setting aside the election, for it is not up to the Board staff to seek out evidence that would warrant setting aside the election". *United States Rubber Co. v. NLRB*, 5 Cir. 1967, 373 F.2d 602, 606. There must be " 'specific evidence of specific events from or about specific people' in suport of allegations having a basis in law sufficient to overturn the election". *NLRB v. Golden Age Beverage Co.*, No. 26,286, 5 Cir. July 7, 1969 [F.2d], *quoting NLRB v. Douglas County Electric Membership Corp.*, 5 Cir. 1966, 358 F.2d 125, 130. We are reminded of "the wide degree of discretion entrusted to the Board in representation matters, as well as our duty to determine only whether the Board's conclusion is reasonably drawn from the evidence submitted and the circumstances surrounding the election". *Golden Age Beverage* at .

Singleton contends that the record is inadequate; that the Board did not have before it sufficient evidence to be able to rule fairly on the Company's objections. Apparently, Singleton would have us lay this deficiency at the Board's door on account of its refusal to conduct a hearing. But we frame the question in this fashion. (1) Would Singleton's evidence, if true, be "sufficient to overturn the election"? *Golden Age Beverage* at ; *NLRB v. Crest Leather Manufacturing Corp., supra*, at ; *National Cash Register Co. v NLRB*, No. 26,175, 5 Cir. Aug. 20, 1969 [F.2d]. (2) Is there a substantial and material factual issue concerning this evidence that only a hearing can resolve? *Home Town Foods, Inc. v. NLRB*, 5 Cir. 1967, 379 F.2d 241, 244.

Since Singleton on appeal does "not attempt to argue" whether the evidence it presented required the Board to set aside the election, we are remitted to its Objections to Conduct Affecting Outcome of Second

Election that it presented to the Regional Director. We find three main objections: Union coercion through threats of physical violence and job loss; participation in the election by ineligible voters; and improper location of the polling station. We deal with these in order, gauging their significance in light of Singleton's exhortations that its employees boycott the election.

(1) Union Coercion. We note, first, that the Regional Director did not discredit Singleton's affidavits. Instead, he found that they did not raise a meritorious objection. Consequently, we do not reach the question whether a hearing was required, but only whether the allegations would require a new election. Two employees submitted affidavits which, in relevant part, alleged the following.[3] Employee White said that a fellow employee who lived in the same apartment house "tried to get me to go down to vote in the National Labor Relations Board election. She had been after me about this subject several weeks before the election". On another occasion, the same employee told employee White that it "looks like you are for the company" and "acted like she was mad at me". Employee Alfonso stated that a fellow employee had threatened her with loss of her job if the Union won (no witnesses were present), physical violence if she crossed a picket line to be set up after the election (no witnesses were present), and bombing of her house if she didn't vote ("in the hall when the Peelers were going home"). The Regional Director found that there was no evidence that the threats were made by an agent of the Union; that the threats were to require the witness to vote, not necessarily for the Union.

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[3] We omit reference to certain incidents alleged in the affidavits because they occurred either after the election or long before the petition for election was filed, and no evidence was adduced to show their effect was present at the time of the election. *See Golden Age Beverage, supra,* at ; Ideal Elec. & Mfg. Co., 134 N.L.R.B. No. 133 (1961).

We are not impressed with this finding. But the question is not the existence of improper conduct with respect to two employees but whether the conduct "created an environment of tension or coercion such as to preclude employees from exercising a free choice. For conduct to warrant setting aside an election, not only must that conduct be coercive, but it must be so related to the election as to have had a probable effect upon the employees' action at the polls". *NLRB v. Zelrich Co.*, 5 Cir. 1965, 344 F.2d 1011, 1015. We rely not on the absence of agency, *Home Town Foods*, at 244, but on Singleton's failure of proof that the conduct destroyed the atmosphere necessary for free choice in the election. Singleton cannot excuse its failure merely by alleging that other incidents occurred which it could not effectively investigate. The Regional Director's investigation was all that it deserved on such a sparse showing. The compelling inference to be drawn from the record is not that pro-Company employees were intimidated but that they stayed home on election day because hey heeded the Company's call to boycott the election.

(2) Ineligible Voters. Singleton submitted to the Regional Director the names of two individuals. One of these had "stated to Employer that she definitely did not vote on election day, but was told by union adherents that someone signed her name and voted for her". The other voter had allegedly voted although ineligible. Upon examination of the voters' affidavits,[4] the Regional Director found that in fact a ballot had not been cast for the first employee and that the second employee's vote had been challenged and not counted. At Singleton's request, the Director also compared the voters' names with a post-election eligibility list submitted by Singleton. He found that five persons had voted whose names were not on the list. However, in view of the fact that the five were on the eligibility list for the first election where they voted without chal-

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[4] Employees had voted by affidavit since Singleton refused to provide an eligibility list.

lenge; that Singleton was repeatedly asked to but refused to furnish an eligibility list; that Singleton was informed that the employees would be voted by affidavit; and that Singleton declined to attend a pre-election conference and failed to designate election observers who could have challenged the five, the Regional Director concluded that the ballots should be held valid and overruled the objection. We do not disturb this conclusion.

(3) Election Location. Singleton requested that the election be set aside because of its location. According to Singleton, the Palladium Ballroom was, "as a matter of common and public knowledge", "a public bar and dance hall", and the Union had held a rally there the night previous to the election. Singleton concluded that the requisite laboratory atmosphere for an election has thus been destroyed. Since Singleton presented no evidence on its first contention, we do not find a "substantial and material factual issue" created by the Regional Director's acceptance of the owner's testimony that there was no bar on the premises of the Palladium Ballroom, that no alcoholic beverages were sold there, that it had not been open to the general public since March 1966, that from March to May it had been used for political rallies and campaign headquarters, and that since May it had been used only for the Union meeting and the Board election. Thus, this is a case "which merely 'question[s] the ultimate interpretation' placed by the Director on certain conduct,' *NLRB v. Simplot Co.*, 9 Cir. 1963, 332 F.2d 170, 172, [and] a hearing is not required". *National Cash Register, supra*, at ____. The Regional Director found that the purpose of the Union meeting was to acquaint members with the location of the polling place, that there was no evidence presented to show that the election site was inadequate, its location unknown to employees or that a free expression of choice was prevented, and that the location had been selected after an extensive investigation as the most desirable and feasible for the election. Accordingly, he overruled

the objection. We find this decision to be within the Board's and its agents' discretion, and supported by the record which contains "only bare unsupported assertions of such effects [to the contrary] by the Company. In this matter we shall not second-guess the Board, which is closely attuned to the election from the time when the petition is first filed, and thus is in a better position to hear and decide questions concerning the fairness of the election process". *Golden Age Beverage* at .

Similarly, when we review the foregoing objections in their totality, see *Home Town Foods* at 244, we cannot conclude that the Regional Director and the Board abused their discretion in refusing to void the second election.[5]

Our resolution of these three objections that Singleton construed as requiring a post-election hearing disposes also of Singleton's demand for an evidentiary hearing before the Trial Examiner on the unfair labor practice charge. If no post-election hearing was required, we cannot find a hearing necessary at the unfair labor practice proceeding unless extraordinary circumstances such as newly discovered evidence require a different result. *Crest Leather* at ; *Douglas County Electric* at 129 & n. 10. Singleton presents no such circumstances.

We ENFORCE the order of the Board.

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[5] Like the Court in *Golden Age Beverage, supra,* we point out that "our decision is in no wise inconsistent with the outflux of recent cases decided by this Court where the Board's order to bargain has been denied enforcement because of the failure to provide the objecting party a hearing on its objections." This case, like *Golden Age Beverage,* "involve[s] objections whose very nature and probable impact upon the employees' free choice are of an entirely different order." *Id.* at , n. 6. As factors supporting that conclusion, we point to the one-sidedness of the vote, the poorly supported and insubstantial objections, the failure to show that a material number of employees were influenced by the conduct, and the objecting party's concurrent responsibility.

U. S. Court of Appeals
FILED
Nov. 5, 1969
Edward W. Wadsworth
Clerk

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 26784

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SINGLETON PACKING CORP.,
Respondent.

JUDGMENT

Before: WISDOM and CARSWELL, Circuit Judges, and ROBERTS, District Judge.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Singleton Packing Corp., its officers, agents, successors, and assigns on August 31, 1967. The Court heard arguments of respective counsel on June 18, 1969, and has considered the briefs and transcript of record filed in this cause. On October 13, 1969, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said Order of the National Labor Relations Board in said proceeding be enforced and that Respondent, Singleton Packing Corp., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: NOV. 5, 1969

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26784

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SINGLETON PACKING CORP.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Florida case)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(April 30, 1970)

Before WISDOM and CARSWELL*, Circuit Judges, and ROBERTS, District Judge

PER CURIAM: The Petition for Rehearing is DENIED and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

*Judge Carswell participated in the original decision but did not take part in the denial of this petition for rehearing and petition for rehearing en banc.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 278

SINGLETON PACKING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 418 F.2d 275. The Board's Decision and Order (R. 176-186, 190-191)[1] are reported at 167 NLRB 304.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1969, and a petition for rehearing

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[1] "R" references are to the appendix filed by the parties in the court below.

was denied on April 30, 1970 (Pet. App. A13-A14). The petition for a writ of certiorari was filed on June 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly rejected the employer's objection that the representation election was invalid because too few of the employees in the unit voted.

2. Whether the objections of the employer to the election raised material issues of fact so as to entitle it to an evidentiary hearing before the Board.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

In May 1966, the Board's Regional Director conducted a union representation election among the pro-

duction and maintenance employees of petitioner, which the Union (Local 104, Hotel & Restaurant Employees International Union) lost 180 to 237. The Union filed objections alleging that the election should be set aside. (R. 6-7.) Following an investigation, the Regional Director sustained the Union's objections on the grounds that the Company had refused on request to furnish a list of names and addresses of all eligible voters (see *Excelsior Underwear, Inc.*, 156 NLRB 1236)[2] and had engaged in misconduct which interfered with employee free choice in the election (R. 53-77). The Board set the election aside solely on the basis of the Company's failure to furnish the *Excelsior* list and ordered a new election (R. 90-93).

Following the Board's decision, the Company advised the Regional Director that it would again refuse to supply the *Excelsior* list, that in its view the first election was proper and that it would "not cooperate in any way whatsoever in conducting a second election" (R. 114). Accordingly, the Company refused to permit the balloting to take place on its premises, refused to supply an eligibility list to the Board and repeatedly urged its employees to boycott the election (R. 115-119). The Company also would not participate in a pre-election conference, designate election observers or permit election notices to be delivered to its employees at the plant (R. 112, 116-117). Because of the Company's conduct, the Board was forced to

[2] The validity of the *Excelsior* requirement was sustained in *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759.

select an off-plant site in which to hold the election and to hand-distribute notices of the election to employees as they reported for work. The Company was notified that the employees would vote only after submitting affidavits as to their eligibility (R. 115-117).

In October 1966, the second election was held and the Union won, 136 to 1 (R. 108-109). The Company filed objections to the election, alleging, in part, that (R. 109-110):

1. An insufficient number of employees voted in the second election to consider the vote a representative sample of all the employees in the unit.
2. The Union engaged in pre-election threats to the employees.
3. Certain ineligible employees voted in the election.
4. The election was held in an unsuitable place, where a union rally had been held the night before the election.

After a full investigation, pursuant to the Board's Rules and Regulations (Section 102.69(c), 29 C.F.R. 102.69(c)), during which the parties were given the opportunity to submit pertinent evidence, the Regional Director concluded that the Company's objections were without merit and recommended that they be overruled (R. 126-127). The Director's relevant findings are as follows:

1. In response to the Company's contention that "an insufficient number" of employees participated in that election (137 out of 506 eligible employees) (R. 109), the Director found that the time, place, and

hours of the second election were well publicized, and that the low turnout, which was not sufficiently low to invalidate the election, was primarily caused by the Company's own statements to the employees to boycott the election (R. 119-120).

2. Accepting as true the allegations made in affidavits (submitted by the Company) of two employees that one employee had strongly advocated participation in the election and another had made certain threats in connection with the election, the Regional Director found no evidence that the alleged threats were made by persons acting on behalf of the Union. He further found that the alleged threats were simply aimed at getting the employees to vote in the election, and not necessarily to vote for the Union and that, in these circumstances, they could not be deemed to have affected employee free choice (R. 122).

3. With respect to the Company's contention that seven voters in the second election were ineligible, the Director found that five were eligible and that the votes of the other two had not in fact been counted (R. 111-112, 122-123).

4. Finally, the Regional Director rejected the challenge of the election on the ground that it was held in a "public bar and dance hall at which site a Union rally and meeting was held the night before the election" (R. 110). Noting that an alternate location for the election was necessitated by the Company's failure to cooperate in the conduct of the second election (R. 114, 124), he found that the ballroom, located approximately one mile from the Company's plant,

was chosen after an "extensive investigation" showed it to be the most desirable and feasible place for the election. No alcoholic beverages were sold during the election in the ballroom, which had actually been closed to the public for several months prior to the election (R. 124). The Regional Director further found that, while the Union had held a meeting there the night before the election, the purpose of this meeting was simply to acquaint the employees with the location of the election (R. 124). Accordingly, the Director concluded that the use of the ballroom did not interfere with employee free choice in the election (R. 125).

The Company filed exceptions to the Regional Director's report with the Board (R. 128-133). Upon consideration of the entire record, the Board found that the Company's exceptions raised "no material or substantial issues of fact or law warranting reversal of the Regional Director's findings, conclusions and recommendations" and accordingly certified the Union as the bargaining representative of the Company's employees (R. 133-134).

Still of the view that the second election was invalid, the Company subsequently refused to bargain with the Union, leading to the issuance of an unfair labor practice complaint. After the Company filed its answer, the Board's General Counsel moved for summary judgment on the ground that the only issues raised by the Company had been decided in the underlying representation proceedings and should not be relitigated (R. 150). The Trial Examiner granted the motion and recommended that the Company be

ordered to bargain with the Union (R. 179-186), which recommendation the Board adopted (R. 190-191). The court of appeals sustained the Board's decision and enforced its order (Pet. App. A1-A12).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with a decision of any other circuit. There is thus no warrant for further review.

1. Petitioner contends (Pet. 11) that the second election was invalid because only 27 percent of the eligible voters participated. Past precedents require no minimum percentage of participation, but hold that, if an election has been sufficiently publicized and the employees have been afforded full opportunity to vote, the majority of those who cast ballots decide the election, even though they may constitute a small proportion of the eligible voters. As stated in *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F.2d 474, 477 (C.A. 5), "voters who could have voted in a formal election but do not are considered to assent to the majority of those who do vote." See *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, 560; *National Labor Relations Board* v. *Deutsch Co.* (230 out of 460 eligible employees voted), 265 F.2d 473, 478-481 (C.A. 9), certiorari denied, 361 U.S. 963; *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board* (56 out of 225 eligible employees voted), 114 F.2d 144 (C.A. 7); *Standard Lime & Stone Co.* v. *National Labor Relations Board*, 149 F.2d 435, 436-439 (C.A. 4), certio-

rari denied, 326 U.S. 723; *National Labor Relations Board* v. *Central Dispensary & Emergency Hospital*, 145 F.2d 852, 853-854 (C.A.D.C.), certiorari denied, 324 U.S. 847; *National Mineral Co.* (83 out of 453 employees voted), 39 NLRB 344, enforced, 134 F.2d 424 (C.A. 7), certiorari denied, 320 U.S. 753. As the court below correctly pointed out (Pet. App. A7), application of this principle is particularly appropriate here where it would obviously be inequitable to allow the Company to urge employees to boycott the election and then subsequently have the election invalidated on the basis of the small turnout.

2. Petitioner's contention that it was entitled to an evidentiary hearing at some point during the proceedings is premised on its view that its objections to the second election presented material issues of fact.[3] The Regional Director, however, accepted for the most part the Company's factual allegations but found that the conduct alleged was not sufficient to affect the results of the election. The allegation that two employees were coerced, for example, was accepted as true, but this conduct was found not to have had " 'a probable effect upon the employees' action at the polls' " (Pet. App. A10). The Company's allegations concerning the eligibility of certain voters and the appropriateness of the polling place raised no disputed factual issues. In these circumstances, no evidentiary hearing was required.

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[3] Section 102.69(c) (29 C.F.R. 102.69(c)) of the Board's Rules provides for an evidentiary hearing where objections present "substantial and material factual issues."